IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE P.R.RAMAN
&
THE HONOURABLE MR. JUSTICE K.P.BALACHANDRAN

TUESDAY, THE 28TH NOVEMBER 2006 / 7TH AGRAHAYANA 1928

AS.No. 535 of 1994

OS.92/1992 of SUB COURT, SULTHAN BATHERY
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APPELLANTS/DEFENDANTS 1 TO 3:

1. VAKKULANGARA V.SAINABA, AGED 29,
   D/O HYDROSE, ANJUKUNNU AMSOM DESOM,
   MANANTHAVADY TALUK.

2. VAKKULANGARA V.MUHAMMED, BUSINESS,
   S/O HYDROSE, BEENACHI AMSOM DESOM,
   BATHERY TALUK.

3. HASEENA WOOD INDUSTRIES REP. BY ITS
   MANAGING PARTNER V.ABOOBACKER,
   HASEENA WOOD INDUSTRIES, ANJUKUNNU
   P.O., MANANTHAVADY TALUK.

BY ADV. SRI.T.G.RAJENDRAN

RESPONDENT/PLAINTIFF:

A.V.DEVANANDA, S/O ARIKODI PARAMBATH
VASUDEVAN ADIYODI, AGED 32 YEARS,
KOZHIKODE TALUK, VENGARI VILLAGE,
NEDUMGOTTUR DESOM, KOZHIKODE.

BY ADV. SRI.M.C.SEN

THIS APPEAL SUITS HAVING BEEN FINALLY HEARD ON 28/11/2006, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.R. Raman & K.P.Balachandran, JJ.

A.S.No. 535 Of 1994

JUDGMENT

Balachandran, J.

Defendants 1 to 3 in O.S.No.92/92 on the file of the Sub Court, Sulthan Bathery are the appellants. Respondent instituted the said suit for return of advance money paid under an agreement to sell the scheduled properties, inter alia, on the following allegations:

2. Scheduled Item No.1 property belongs to the first defendant and Scheduled Item No.2 property belongs to the second defendant. Both those items were valued at Rs.40,000/- each and the plaintiff entered into an agreement with defendants 1 and 2 for purchase of those two items of properties for a total consideration of Rs.80,000/- and paid an advance of Rs.35,000/- each to defendants 1 and 2. Exhibit A1 is the said agreement. It provides for

sale of the said properties on payment of the balance consideration of Rs.5,000/- each respectively to defendants 1 and 2. The period of agreement was six months only. Plaintiff was ready and willing to perform his part of the contract. On the other hand, defendants 1 and 2 were not willing to perform their part of the contract and persuaded the plaintiff to absolve them from their liability to execute the sale deed in relation to the scheduled properties and Sri.Aboobacker, the Managing Partner of the third defendant firm agreed to repay the sum paid to appellants 1 and 2 together with interest thereof. The amount so payable to the plaintiff was ascertained to be Rs.84,000/- as on 26.6.1991 and Sri.Aboobacker, the Managing Partner of the third defendant firm issued cheque for that amount in favor of the plaintiff. On presentation, the cheque was dishonoured, assigning the reason “refer to drawer”. According to the plaintiff, it was only on the basis of the

undertaking of defendants 1 to 3 to return the advance amount with interest at fifteen percent per annum that defendants 1 and 2 were exonerated from their liability to execute the sale deed in specific performance of the agreement. Consequent on dishonour of the cheque, plaintiff caused lawyer notice to be issued, demanding the sum due under the cheque. The first defendant refused to receive the notice, whereas defendants 1 and 3, who received notices, did not pay the amount covered by the cheque nor did they issue any reply and hence, the suit.

3. Defendants filed a joint written statement, resisting the suit. According to them, the suit is not maintainable and is hit by Section 62 of the Indian Contract Act. The alleged agreement was not an agreement to sell the property. Plaintiff and his father Vasudevan Adiyodi are money lenders. The partners of the third defendant firm are Aboobacker, his brother Ummer and their father

Hydrose. The third defendant firm started a Saw Mill and Ply Wood making unit. They anticipated working capital loan from Bank and subsidy from Government. As there was delay in getting the loan amount and subsidy, the partners of the third defendant firm availed of a loan of Rs.50,000/- from the plaintiff's father Sri.Adiyodi at interest at five percent per month. Plaintiff's father Sri.Adiyodi was being introduced to them by one Moidu Hajee from Vadakara. The alleged agreement referred to in the plaint was one executed in the said loan transaction. The agreement was to repay the loan within six months. Out of the said loan amount, an amount of Rs.38,000/- was repaid. The third defendant used to be on tour for business purposes. Hence he used to keep a few signed blank cheque leaves in the drawer of his office table. He found that one out of the said signed cheque leaves, on the basis of which the suit is filed, was missing on 24.4.1990. Thereupon he requested

the Bank to stop payment of that cheque. The third defendant came to know that the plaintiff has taken away the cheque leaf only when he received the lawyer notice, prior to the institution of the complaint before the Additional Judicial First Class Magistrate's Court, Kozhikode as S.T.No.341/91. The suit is on the basis of an "unconscionable" contract. The plaintiff is not entitled to any relief and the suit is liable to be dismissed.

4. The trial court raised necessary issues for trial and after trial and considering the evidence adduced at trial, which consisted of oral evidence of PW1 and DWs 1 and 2 and documentary evidence Exhibits A1 to A6 and B1 to B4, decreed the suit with costs and hence, this appeal by the aggrieved defendants.

5. The parties are being referred to as their status are in the trial court.

6. It has come out in evidence that defendants 1 and 2 and Aboobacker, the Managing Partner of the third defendant firm are children of DW2 Hydrose, who also is a partner in the third defendant firm. According to plaintiff, defendants 1 and 2, were entering into Exhibit A1 agreement for sale of the scheduled items of properties belonging to them to procure funds for completion of the Saw Mill 'Haseena Wood Industries', but that, on completion of the construction, they wanted to get rid of the obligation under Exhibit A1 agreement and were persuading the plaintiff not to insist for specific performance of Exhibit A1 agreement. According to the plaintiff, he came to an understanding with the defendants and agreed to have the advance amount returned with interest, which was fixed at Rs.84,000/- as on 26.2.1991 and cheque for that amount was issued by DW1 Aboobacker, who is their brother and Managing Partner of 'Haseena Wood Industries' and it was thus that DW1 happened to

issue Exhibit A2 cheque for Rs.84,000/-. It has further come out in evidence that consequent on dishonour of the cheque, a complaint under Section 138 of the Negotiable Instruments Act also is filed by the plaintiff against the defendants.

7. The contention in the joint written statement filed by defendants 1 to 3 is that Exhibit A2 cheque is one, which is made up on a blank signed cheque leaf kept in the draw of the table by the third defendant at his office and that was being stolen away by the plaintiff. It was also contended that out of the loan amount, Rs.38,000/- is already discharged and the loan was actually Rs.50,000/- and not Rs.70,000/-.

8. It is strange that defendants 1 and 2, who were the executants of Exhibit A1 agreement in favour of the plaintiff have not entered into the witness box to swear to their contention set up in the joint written statement filed by them along with the third defendant. In support of the plaint

claim, the plaintiff has given evidence as PW1. To establish the contention in the written statement, the witnesses, who have given evidence are DW1, the Managing Partner of the third defendant firm and DW2, the father of DW1 and defendants 1 and 2. In as much as defendants 1 and 2 have not tendered any evidence, the recital in Exhibit A1 agreement that they have received an amount of Rs.35,000/- each, making a total of Rs.70,000/- under Exhibit A1 agreement has to be accepted. The contention of DW1 Aboobacker that the cheque leaf kept signed by him in the drawer of his table was found missing on 25.4.1990 and it was only on receipt of notice, consequent on dishonour of the cheque, that he came to know that it was the plaintiff, who had stolen the cheque leaf, is not a contention that is established on the evidence in the case. According to DW1, the cheque was missing from 24.4.1990 and he issued stop payment memo to the Bank. Exhibit B3 series are copy of letter alleged to have been

sent by Haseena Wood Industries to the Manager, Syndicate Bank, Panamaram with postal receipt and acknowledgment card. None of the officials of the Bank was examined as a witness to show that the original thereof had been received at the Bank. The trial court disbelieved the case of the defendants that such a memo had been issued by the third defendant to their Bankers by registered post, as the place of business of the third appellant and place of the concerned branch of the Syndicate Bank were at Panamaram itself and that stop memo will be issued to the Bank immediately to avoid delay and will be caused to be recorded by the Bank in its registers forthwith. That is not shown to have been done in the instant case. Exhibit B2 is the notice issued to the third defendant intimating him about the dishonour of the cheque and demanding payment of the amounts covered thereunder. The said notice is actually a copy of the letter sent to defendants 1 and 2. None of the

defendants have issued reply to Exhibit B2 notice denying their liability to make payment of the amount covered by Exhibit A2 cheque, consequent on its dishonour. If at all no amount was due to the plaintiff consequent on dishonour of Exhibit A2 cheque, then in all probabilities, the third appellant would have issued reply refuting the liability to pay any amount and contending that Exhibit A2 is cheque made up on a stolen signed cheque leaf. Exhibit A3 is a further notice issued by the plaintiff on 30.4.1992, immediately preceding institution of the suit. The suit was instituted only on 23.5.1992. No reply was issued by any of the defendants to Exhibit A3 notice. Though DW1 Aboobacker deposed on behalf of the third defendant firm that he is in the habit of maintaining the counter foil of the cheque books, recording the names of the persons to whom the cheques were issued, he has not produced counter foil of the cheque book from wherein Exhibit A2

cheque is seen issued and no reason also is assigned for its non production. DW1 further gave evidence that he is in the habit of writing the names of payee in the cheque in Malayalam. The trial court has observed that in Exhibit A2, the name of the payee is written in Malayalam itself. Despite the plaintiff setting up a case that the relevant cheque book was issued to the third defendant only in the year 1991 from the Bank and that is denied by DW1, he has not taken any steps to get down the cheque issue register from the Syndicate Bank, Panamaram to show that the cheque book containing Exhibit A2 cheque was issued to him in 1990 itself, when only his contention that the cheque was found missing on 24.4.1990 could be established. The trial court has further observed that DW1 has deposed that whenever he goes out, he used to keep signed blank cheque leaves in the drawer of his table in his office and that is unbelievable and further that DW1 has deposed that

he will not entrust signed blank cheque leaves with anyone. It was also observed by the court below that DW1 Aboobacker has not taken any steps against the plaintiff even after his coming to know that it was the plaintiff, who has stolen Exhibit A2 cheque, as contended by him. It was, for all the above reasons, that the trial court found that the contention of the defendants that Exhibit A2 cheque is one brought into existence on a signed blank cheque leaf, which was found missing from the drawer of the office table of the third defendant is false. The said finding of the trial court is based on strong grounds and does not deserve to be interfered with.

9. Though the defendants have in their joint written statement disputed the allegation that Exhibit A1 agreement was entered into between defendants 1 and 2 and the plaintiff for sale of the scheduled properties, neither the first defendant nor the second defendant has cared to

come to the witness box to swear to their contentions when they are the best persons to give evidence in that matter. Though their contention is that the transaction was only a loan transaction; that the amount borrowed was only Rs.50,000/- on an agreed rate of interest at the rate of five percent per month and they repaid Rs.38,000/- therefrom, there is absolutely no convincing evidence to establish the said contention.

10. In the nature of the contentions set up, the burden was heavy on the defendants to establish their contentions, but, they have miserably failed to establish the contentions so set up by them. It is worthy to note that the executants of Exhibit A1 agreement are defendants 1 and 2 only and formidable contentions are attempted to be set up by DWs 1 and 2 without defendants 1 and 2 themselves entering into the witness box. It is also worthy to note that though the contention of the defendants is that a loan amount of

Rs.50,000/- was being availed of from the father of PW1, who is a money lendor and the loan was being arranged through one Moidu Hajee at Vadakara, neither the father of PW1 nor the said Moidu Hajee, who is stated to be a mediator in the alleged loan transaction, is examined as a witness in the case. Though DW2, the father of DW1 and defendants 1 and 2 deposed that he had received a sum of Rupees Fifty thousand from the father of PW1 and that the document in that behalf is with the father of PW1 even now, he does not remember the date on which the said amount of Rupees fifty thousand was borrowed and also he does not remember the date on which Rupees thirty eight thousand was repaid to the father of PW1. Further, according to him, an amount of Rs.38,000/- was being paid in five instalments, but he states that he did not receive any receipt. However, DW2 admitted that defendants 1 and 2, who are his children executed Exhibit A1 agreement and that they received the amount stated

in Exhibit A1. The amount stated in Exhibit A1 is Rs.70,000/-. DW1 has also stated that the title deed of the properties described in Exhibit A1 is with the plaintiff. This is suggestive of the truth of the case of the plaintiff. The trial court also observed that according to DW1, he is keeping accounts and his accounts will show the persons from whom he has received money and the names of the persons to whom he has paid money by cheque. The said document also is withheld for reasons best known to DW1 himself. If at all that would evidence repayment of Rs.38,000/- to the father of PW1, DW1 would have produced the said account book to substantiate his contentions. The trial court further observed that in Exhibit B1 letter written by the father of PW1 on 28.4.1990, it is stated that DW1 cannot be given any more time to pay back the money. DW1 cannot explain as to which is the amount that is made reference of. Thus, on an over all appreciation of the entire evidence adduced in

the case in a meticulous manner, the trial court found that Ext.A1 agreement is real and genuine and that defendants 1 and 2 have received an amount of Rs.70,000/- from the plaintiff thereunder by way of advance. The evidence tendered by PW1 shows that he agreed to absolve defendants 1 and 2 from performing their part of Exhibit A1 agreement on the third defendant issuing Exhibit A2 cheque. Thus, the third defendant also got himself bound legally to discharge the debt due to the plaintiff. The trial court accepted the amount due to the plaintiff from the defendants as on the date of issue of Exhibit A2 cheque on 26.2.1991 as Rs.84,000/- and has decreed the suit for repayment of the said amount with future interest on the principal sum of Rs.70,000/- at the rate of 12% per annum from the date of cheque, viz., 26.2.1991 till date of realisation as also the costs of the suit. The decree so granted in favour of the plaintiff is correct, legal and proper and the learned counsel

for the appellants/defendants has not been able to establish any circumstance, which warrants interference in the decree passed by the court below.

11. In the result, this appeal is devoid of merit and deserves to be dismissed with costs. We do so.

(P.R.Raman, Judge)

28th November, 2006

(K.P.Balachandran, Judge)

tkv

P.R.Raman & K.P.Balachandran, JJ.

A.S.No.535 of 1994

JUDGMENT

28th November, 2006